

**IN THE SUPREME COURT OF MISSOURI**

UNITED STATES DEPARTMENT OF	)	
VETERANS AFFAIRS,	)	
	)	
Appellant,	)	SC92541
	)	
v.	)	
	)	
KARLA O. BORESI,	)	September 5, 2012
CHIEF ADMINISTRATIVE LAW JUDGE,	)	
	)	
Respondent.	)	

**SUBSTITUTE REPLY BRIEF OF APPELLANT**

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## ARGUMENT

**1. Respondent is asking this Court to impose pleading requirements on VA (standing in the shoes of a claimant) that Missouri law does not impose on a claimant.**

In compliance with Rule 84.04(g), the Department of Veterans Affairs (“VA”) will not reargue points covered in its original brief, but directs the Court to pages 15-16 of its original brief as partial response to Respondent’s brief. Workers’ compensation proceedings are directed by statute to be summary and informal, and VA is aware of no statutory authority for the judges to grant a party’s motion to dismiss or motion for summary judgment based on technical pleading deficiencies. Rather, the merits of the parties’ positions are only adjudicated at the conclusion of a temporary or final award hearing pursuant to § 287.460 RSMo. and 287.510 RSMo. It would be inconsistent with that procedure for this Court to create pleading requirements that bar VA’s request to intervene in this case to conduct basic discovery and to determine whether it has a colorable claim for payment of unauthorized medical expenses to present at a final hearing.

Specifically, Respondent argues that VA failed to allege that the employer was on notice of the need for care and refused to authorize the care (Brief of Respondent, p. 6). However, VA is not aware of any Missouri statute or rule that those are allegations an employee is required to make to file a claim for unauthorized medical expenses. The Respondent’s approved claim form merely states “Claim is hereby made for all

compensation as provided in the Missouri Workers' Compensation law, relating to injury (or death) of the employee by accident arising out of and in the course of the employment." (See a sample on Respondent's website at <http://labor.mo.gov/DWC/Forms/WC-21-AI.pdf>). Respondent has not cited, and VA is not aware of, any example of a claim for compensation being rejected for filing by the Division of Workers' Compensation for failure to allege that an employer was aware of the need for medical care and refused to provide it. At hearing, a claimant is certainly required to prove these elements to be awarded payment for unauthorized medical expenses, as would VA. See *Dudley v. City of Des Peres*, 72 S.W.3d 134 (Mo.App. 2002). However, requiring VA to plead these elements to even initiate a claim when a claimant is not required to do so is patently inconsistent with VA's statutorily mandated "right to recover or collect reasonable charges for such care or services . . . to the extent that the veteran . . . would be eligible to receive payment for such care or services." 38 U.S.C. § 1729(a)(1). The allegations in VA's motion that Respondent refers to as "sketchy facts" are more detailed than any pleading requirement Respondent imposes on an individual claimant, and there is no statutory or other basis to hold VA to a higher standard.

**2. Respondent is defending discretion that was not exercised.**

As stated above, Respondent argues that VA failed to allege that the employer was on notice of the need for care and refused to authorize it, and that therefore ALJ Boresi and Judge Neill did not abuse their discretion in denying VA's motion and petition.

Respondent argues “On the record before this Court, before the circuit court, and before Judge Boresi, there is simply no basis on which to conclude that Mr. Hollis had a claim for payment of the costs of care provided by the VA . . . Thus neither Judge Boresi, in denying the motion, nor the circuit court, in denying the petition, abused their discretion.” (Respondent’s Brief, p. 8). This argument sidesteps the fact that neither judge denied VA’s claim on the basis of a pleading deficiency.

Rather, Judge Boresi denied the motion on the grounds that she had “no authority to permit intervention.” (Substitute Appendix, p. A12). Judge Neill denied the petition on the ground that “Relator cites no authority under which the Court can find that Relator is authorized to be treated as superior to other care and service providers.” (Substitute Appendix, p. A19). Therefore, Respondent’s arguments regarding technical pleading deficiencies, even if this Court found them convincing, defend an exercise of discretion that was not exercised. Instead, as argued in the Substitute Brief of Appellant, the discretion that was exercised by those judges was based on inaccurate statements of law.

While Respondent argues VA did not raise the argument to Judge Neill that VA was specifically claiming standing to intervene in the shoes of the employee rather than as a private medical provider (Brief of Respondent, pp. 6-7), a review of the suggestions shows that VA did not specify which of two standings it was asserting, only that VA was asserting a right to intervene under 38 U.S.C. § 1729 (Appendix to Substitute Brief of Appellant, pp. 4-6). The fact that Judge Neill only addressed one of VA’s two possibilities is not an omission that has any bearing on the argument VA is making to this

Court. VA asks this Court to address the plain language of the statute and compel a ministerial duty required by law.

**3. If this Court decides VA's motion was technically deficient, VA requests a remedy other than simple denial of this appeal.**

While VA believes its substantive arguments are dispositive, if this Court merely affirms the Court of Appeals' decision denying VA's request for a writ of mandamus, such decision will likely result in at least two unfavorable consequences. First, it will affirm the Court of Appeals' statement that "because Hollis received unauthorized medical care at the VA's medical facility, under Missouri law he is not entitled to receive any payment from Employer . . ." (Appendix to Substitute Brief of Appellant, p. 23). As previously argued, this is an incorrect statement of Missouri law (Substitute Brief of Appellant, pp. 10-11).

Second, if VA's claim is denied here on a pleading technicality, VA's remedy is to file a new motion to intervene in this case, adding the allegations suggested by Respondent. There is no reason to believe Judge Boresi or Judge Neill or the Court of Appeals will rule any differently that they did previously. As argued earlier, no one has ever denied VA's motion based on a pleading deficiency. Assuming the lower authorities rule consistently with their prior substantive rulings, VA will come back to this Court another two years or so later, requesting a ruling on the substantive legal issue before this Court now. VA requests this ruling now as a matter of judicial efficiency. In that same spirit, if this Court decides to deny VA's appeal based on a pleading deficiency, VA

respectfully requests written dicta addressing the substantive issue before this Court. Such dicta could forestall another full-fledged journey of the issue through the judicial review process.

### CONCLUSION

VA's initial pleading exceeded what Respondent requires of an individual employee to file a claim for unreimbursed medical expenses, and there is no statutory or case law basis to hold VA, standing in the shoes of the employee, to a higher standard. The discretion exercised by the ALJ, the circuit court and the Court of Appeals was not supported by law, and the argument that they might have cited a technical pleading defect as a reason to deny VA's claim is not relevant to the issue of whether they abused their discretion in this case. VA respectfully submits that the substantive issue is ripe for an opinion by this Court.

WHEREFORE, VA respectfully requests that the lower courts be directed to issue a writ directing Judge Boresi, on behalf of the Division of Workers' Compensation, to issue an order allowing Appellant to intervene and participate as a party (to include receiving notice of case settings as required by the DWC's own regulations at 8 C.S.R. 50-2.010(9)(C)) to assert a claim for payment of unauthorized medical expenses that the veteran would otherwise be able to assert, and for such other relief as this Court deems just and proper.

Respectfully submitted,

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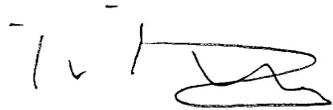
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**CERTIFICATE**

Pursuant to Rule 84.06(c), the undersigned hereby certifies that this pleading includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b). The Substitute Reply Brief of Appellant contains 2,805 words according the automated word count function of Microsoft Word.

Pursuant to Rule 84.06(g), the undersigned hereby certifies that the electronic files submitted to the Court have been scanned for viruses by the current version of McAfee virus scanning software, and the attached files are virus free.

Pursuant to Rule 103.08, this Substitute Reply Brief of Appellant will be served electronically by the Missouri eFiling system on James Layton, Counsel for Respondent.



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Paul Petraborg